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BUTZEL LONG 350 SOUTH MAIN STREET SUITE 300 ANN ARBOR, MI 48104			EXAMINER REICHL, KARIN M	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/595,256
Filing Date: June 15, 2000
Appellant(s): KUMASAKA, YOSHINORI

Michael S. Gzybowski
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 8-10-07 appealing from the Office action mailed 1-19-05.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,601,547	KATO et al	02-1997
4,641,381	HERAN et al	02-1987
4,940,464	VAN GOMPEL et al	07-1990

0 688 550 A1	KIMBERLY-CLARK CORP.	12-1995
	(EPO)	
4,397,646	DANIELS et al	08-1983

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Language Interpretation

Since a specific definition of the claim terminology “a major portion” has not been specifically defined, the usual or common, i.e. dictionary, definition, will be used, i.e. “Of a greater number, quantity or extent”, i.e. more than 50%.

Ground I:

Claims 1-6 are rejected under 35 U.S.C. 102(b) as being anticipated by Kato et al ‘547.

Claims 1-6 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

See Figures, especially Figures 2-6, the Claim Language Interpretation section supra, col. 1, line 65-col. 2, line 27, col. 4, lines 7-15 and 37-60, col. 5, line 1-col. 6, line 20, col. 30, line 8-col. 31, line 21, col. 31, line 59-col. 36, line 12.

Claims (as well as claims 2-3): the front waist region is 24, the rear waist region is 26, the crotch region is 28, the waist opening is 30, the leg openings are 32, the top sheet is 48 of one or

more layers and the backsheet is 46 of one or more layers, e.g. 50, 52, the covering zone is at least a portion of 24 and 26 except for the elastic zone, the longitudinal end of the covering zone is 36, includes a terminal longitudinal edge which coincides with terminal longitudinal edges of each of the topsheet and backsheet, see paragraph bridging cols. 32-33 and col. 33, lines 17-32, i.e. "may be smaller" also infers may not be smaller, as well as col. 4, lines 55-60 again, i.e. note "desirably" does not require extension of one of the layers as well as col. 4, lines 61 et seq. i.e. '464 and '381 show terminal edges of topsheet and backsheet coincide, the nonmonolithically formed elastic zone is 60, and the first member, 66, and second member, 62, as claimed on lines 20-30 of claim 1, claim 2 and claim 3 are disclosed explicitly in the cited portions supra. With regard to lines 30 et seq of claim 1, as interpreted in light of the paragraph bridging pages 5-6 of the instant specification, the gathers are formed along the entire length when the second member is attached because the second member has gathers and extends along the entire length. The specification discloses that the length of the elastic zone is the same as that of the combined first and second members in the contracted state of the first member, see sentence bridging pages 5-6 of the 7-26-02 specification. The second member portion of '256 has gathers along the length thereof due to its being part of a composite elastic material, see portions of reference cited which teach the composition of the first and second members of the elastic zone, and the entire length of at least one of the waist regions will have gathers due to the attachment of the gathered second member to the terminal edge of the covering zone. In the embodiment where there is a recoverable first member, gathering will also be formed due to recovery thereof. It is noted that the gathers in claim 1 and those in claim 3 are deemed to be the same. Finally, more than 50% or a major portion of the elastic zone width 60 extends beyond border 36, see, e.g., Figure 2.

Although Appellant does not group the dependent claims separately, the rejection of such claims follows:

Claims 2-3: see discussion of claim 1 *supra*.

Claims 4-6: It is noted that the covering area as claimed still does not need to encompass the entire circumferential direction of said at least one of said front and rear waist regions. It is also noted that the length in claim 4 is not required to be the initial length as is recited in claim 3. See again Figures 2, 5-6, col. 5, line 41-col. 6, line 20, col. 30, line 8-col. 31, line 21, col. 33, lines 33-39, col. 35, lines 47-65, i.e. the second member is of inelastically stretchable material, the covering zone is nonstretchable because the components thereof are nonstretchable. With regard to claim 6, at the very least, the covering zone along the terminal edge will be stretchable due to the gathering by elastic 88 which can be applied in the tensioned state or recover latent tension adjacent such edge. The stress stretch in a portion of the covering zone extending along the elastic zone, i.e. including such edge, and of the same width as the elastic zone is higher than that of the elastic zone when stretched by 3-20 % since the covering zone portion is more inelastic due to increased amount of material therein and the greater distance thereof from the elastic 140 as compared to the amount of material therein and distance thereof from the elastic of the elastic zone, see, e.g., col. 4, line 7-15, i.e. since the covering zone portion is more inelastic the stretch stress thereof will necessarily be higher than that of the elastic zone which is more elastic.

Ground II:

Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kato et al '547 in view of K-C '550 and Daniels '646.

Appellant claims structure similar to that provided in the waist being provided around each of the leg openings. Kato et al is silent as to the structure of the leg openings. However it is clear from the disclosure thereof that the opening for the legs would be subject to the same problems as the opening for the waist, i.e. lack of comfortable fit over a wide range of sizes and ease of use over an extended period of use. However, it is well known in the absorbent article art as illustrated, for example, by K-C '550 and Daniels that structure similar to that used in the elastic waist system of an absorbent article is also used in the leg opening areas of the article to provide similar benefits and improvements, see Figure 8 and page 7, lines 6-9 of K-C '550 and Figures , col. 1, lines 66-68 and claims 2 and 4 of Daniels. Therefore to provide an elastic system similar to that at the waist of Kato et al also around each of the leg hole of the Kato et al device would be obvious to one of ordinary skill in the art in view of the recognition that such a feature would provide similar benefits thereto, i.e. contribute to the comfort of the fit and ease of use, as is well known in the art as illustrated by K-C '550 and Daniels, and the desire of such by Kato et al.

(10) Response to Argument

Ground I:

Claims 1-6 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Appellant's arguments on pages 6-13 which are substantially the same as those set forth in the remarks of 4-15-05 have been reconsidered but are still deemed not persuasive because such are narrower than the teachings of the '547 and/or the prior art rejection. More specifically, Appellant argues that the '547 reference does not teach coterminous edges of the topsheet and backsheet explicitly, i.e. only teaches the two embodiments shown in Figures 2 and 3, and thereby, teaches away from such edges. However, this appears to be based on the rationale that what a reference teaches explicitly fails to teach to what the reference does not teach explicitly, i.e. "It seems that a prior art reference should only be relied upon for what it actually teaches and not for want[sic] it fails to exclude", page 9, lines 11-12. However, the Examiner finds this not persuasive 1) because the portions of the '547 reference cited in the rejection (One of which Appellant does not expressly argue, i.e. col. 4, lines 61 et seq and thereby, the design and construction of the pants of '464 and '381 (Note the Figures of such incorporated designs and constructions include coterminous topsheet and backsheet edges)) do explicitly/actually teach what the structure is, i.e. through the use of the terminology "may" and "desirably" rather than the use of other terminology such as "must", "required to", etc., and 2) because the determination

of what a reference teaches/includes necessarily and inevitably includes a determination of what it fails to exclude or excludes. Therefore, since '547 does teach the claimed structure, i.e. not only two embodiments, Appellant's conclusion of express teaching away based thereon is also deemed not persuasive. It is noted that Appellant's reliance on col. 4, lines 12-15 of '547 also as teaching away from the claimed structure is narrower than the disclosure of '547, i.e. Kato does not teach against the elastic zone 60, i.e. an elastic member 66 wrapped in sleeve 62, being joined to the topsheet or backsheet by the sleeve 62 but rather teaches away from incorporating the elastic member between adhesive layers, the topsheet and the backsheet alone or also with a carrier sheet, see e.g. col. 2, first full paragraph, or between full length adhesive layers and the sleeve 62, see col. 4, second full paragraph, i.e. teaches against full adhesive connection directly to an adjacent layer.

Appellant's arguments with regard to obviousness on page 13 have been noted but are deemed not persuasive with regard to the prior art rejection under 35 USC 102.

Therefore, the rejection of claims 1-6 under 35 U.S.C. 102(b) as being anticipated by Kato et al '547 is deemed proper and maintained.

Ground II:

Appellants arguments on page 14, first two full paragraphs have been considered but are deemed not persuasive for the reasons set forth in Section (10), Ground I supra.

The remainder of Applicant's remarks have been considered but are deemed not persuasive because such are not consistent with the prior art rejection which does not rely on prior art teachings to modify the structure of '550 to be that of such prior art, i.e. no bodily incorporation of structure taught by the latter. See the prior art rejection supra, e.g. "Therefore

to provide an elastic system similar to that at the waist of Kato et al also around each of the leg hole of the Kato et al device would be obvious to one of ordinary skill in the art in view of the recognition that such a feature would provide similar benefits thereto, i.e. contribute to the comfort of the fit and ease of use, as is well known in the art as illustrated by K-C '550 and Daniels, and the desire of such by Kato et al."

Therefore, the rejection of claim 8 under 35 U.S.C. 103(a) as being unpatentable over Kato et al '547 in view of K-C '550 and Daniels '646 is deemed proper and maintained.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Karin M. Reichle/

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